Monongahela Power Company *and* Gary J. Cutlip *and* Mark A. Prah. Cases 6–CA–27194 and 6–CA–27213

August 11, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On March 1, 1996, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed a brief in response.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by disciplining employees Gary Cutlip and Mark Prah in retaliation for their protected activities. The judge concluded that, given the remoteness of union activity, the limited evidence of animus, the serious nature of the undisputed safety violations, and the corresponding reasonableness of the Respondent's discipline, Cutlip and Prah would have been suspended and reassigned even if they had not engaged in prior union activity.

As established by the Board in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel is required to make a showing sufficient to support the inference that protected conduct was a motivating factor in the employer's conduct. Once this showing is made, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

In support of his case, the General Counsel relies on uncontested statements made by the Respondent's representatives in 1991 and 1993 reflecting union animus.[2] The judge found that consideration of this evidence was time-barred by Section 10(b) of the Act as well as by non-Board settlement agreements entered into subsequent to the statements. In this regard, we find that the judge erred.

Section 10(b) provides that no complaint shall issue based on any *unfair labor practice* occurring more than 6 months prior to the filing and service of the charge (emphasis added). However, conduct occurring prior to the 10(b) period may be used to shed light on the Respondent's motivation even though the Board may not give it independent and controlling weight. *Machinists Local Lodge 1424 v. NLRB*, 362 U.S. 411, 416–417 (1960).[3]

In the present case, the General Counsel does not allege that the statements in question are independent unfair labor practices. Rather, the General Counsel's unfair labor practice allegations are properly confined to conduct occurring within 6 months of the filing of the charge. In addition, the judge found evidence of animus occurring within the 10(b) period based on statements made at the hearing by the Respondent's station manager that the Respondent has considered Cutlip and Prah to be ''anti-company'' because of their previous union and Board activity. Thus, all of the elements necessary to establish that their union activities were a motivating factor in the Respondent's conduct occurred within the 10(b) period. It is undisputed that the Respondent disciplined and reassigned Cutlip and Prah within that period. Furthermore, the statements made by the Respondent's representatives in 1991 and 1993 may shed light on the station manager's testimony and the Respondent's motivation for disciplining and reassigning Cutlip and Prah. See *Grimmway Farms*, 314 NLRB 73, 74 (1994).

In addition, we find that the non-Board settlement agreements here do not preclude consideration of the statements as evidence shedding light on the Respondent's subsequent discipline of Cutlip and Prah. *Special Mine Services*, 308 NLRB 711, and at 720–721 (1992) (judge properly considered presettlement evidence of animus as shedding ''considerable light'' on motivation for allegedly unlawful subcontracting), enfd. in pertinent part 11 F.3d 88 (7th Cir. 1993); *Kaumagraph Corp.*, 316 NLRB 793, 794 (1995) (evidence of presettlement conduct properly admissible as background for respondent's motivation).[4] Thus, we find

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The statements, undenied by the Respondent, include a supervisor's comment to Cutlip in 1991 that ''Let's face it, Gary, your problem stems from your Union activities''; a manager's statement to Cutlip during a grievance meeting in 1993 that ''don't you expect a little bit of retaliation''; and a statement made by the operations superintendent to a former supervisor in 1993 that he should not talk to employees, including Prah, whom the superintendent considered to be anticompany.

[3] Likewise, the fact that the Charging Parties engaged in the protected conduct prior to the 10(b) period does not preclude a finding that the General Counsel has made a showing that the conduct was a motivating factor in actions taken within the 10(b) period. As noted by the judge in *Marcus Management*, 292 NLRB 251, 262 (1989), ''there is such a thing as latent hostility which bides its time and lies in wait, seeking the appropriate occasion to work its will.''

[4] The cases relied on by the judge are inapposite. In *Heck's Properties*, 264 NLRB 501 (1982), the Board found it unnecessary to rely on the judge's finding that the General Counsel was foreclosed from relying on testimony of presettlement events as background evidence; in *Great Western Produce*, 293 NLRB 362 (1989), the Board found it unnecessary to pass on the judge's foreclosure of such evidence; and in *Wright Motors*, 237 NLRB 570 (1978), the Board

that the General Counsel has presented evidence of union animus of the Respondent and has made a showing of an unlawful motivation for the discipline and reassignment.

The burden therefore shifts to the Respondent to show that the disciplinary actions and reassignments were for substantial business reasons and would have taken place even in the absence of the protected activities engaged in by Cutlip and Prah. For the reasons stated by the judge and established in the record, including the undisputed safety violations by the two employees, their safety records, the seriousness of the ''tagging'' violation, and the relatively mild discipline, we find, in agreement with the judge, that the Respondent has met its burden.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

found a violation of the Act without commenting on the judge's exclusion from evidence of a prior settlement agreement and related testimony.

David L. Shepley, Esq., for the General Counsel.
John Unkovic, Esq., of Pittsburgh, Pennsylvania, and *Edward Kennedy, Esq.*, of Fairmont, West Virginia, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Morgantown, West Virginia, on October 4 and 5, 1994, on the General Counsel's consolidated complaint which alleged that the Respondent suspended and changed the shift assignments of the Charging Parties in violation of Section 8(a)(3) and (4) of the National Labor Relations Act (the Act).

The Respondent generally denied that it committed any violations of the Act and affirmatively contends the complaint should be dismissed as being barred by Section 10(b) of the Act.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is an Ohio corporation engaged in the generation, sale, and distribution of electrical power for residential and commercial uses, operating 13 generating stations including 1 at Maidsville, West Virginia. In the course of this enterprise, the Respondent annually derives gross revenues in excess of $250,000 and annually receives goods, products, and materials valued in excess of $50,000 directly from points outside the State of West Virginia. I therefore conclude that the Respondent is an employer engaged in interstate commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The International Brotherhood of Electrical Workers, AFL–CIO (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The Respondent operates 13 power stations (from a respondent exhibit on the APS Bulk Power Supply Safety and Heath Program dated December 15, 1994), some of which are unionized. The station involved in this matter is designated Fort Martin. Mark Prah testified that since he began his employment in 1978, there have been several attempts to organize the employees at Fort Martin, the three most recent of which occurred in 1988, 1990, and 1992. None of these attempts was successful.

Gary Cutlip was one of the leaders in the 1988 and 1990 campaigns, but fellow employees asked him to stay out of the 1992 effort. Prah was active in 1992, as he had been in 1988 and 1990. Both were involved in a civil suit brought by 20 employees against the Respondent in 1992 which was tried in June 1995. In that case employees sought to enjoin the Respondent's use of a surveillance camera and for damages. They got the injunction but were not awarded damages.

Two previous complaints alleging the Respondent unlawfully disciplined Cutlip and engaged in other unfair labor practices were settled.[1]

The instant complaint arises from two events occurring in January 1995. The facts in both are generally undisputed. Cutlip and Prah were shift maintenance employees, which means their duty hours varied throughout a 5-week cycle. Day maintenance employees work the same schedule each day. Cutlip and Prah had worked together for several years, except the period in 1993–1994 when Cutlip had been reassigned to day maintenance, allegedly in violation of the Act. On settlement of Case 6–CA–26001 he returned to shift maintenance.

On January 12, 1995, Cutlip was observed spray painting a piece of equipment in the welding area of the maintenance shop. This was a violation of a company rule. The Respondent had posted a sign prohibiting painting, which itself had been painted over, but which was still legible.

For this Cutlip received a 2-day suspension from Maintenance Superintendent K. L. Knicely on January 24. Also on January 24, Prah received a verbal reprimand from Supervisor R. W. Lyons assertedly because he was the lead man and therefore responsible for insuring that Cutlip worked safely.

On their shift of January 26, Cutlip and Prah were directed by their foreman, Harry Brown, to help find a leak in one of the condensers. To do so required Prah to go inside the condenser and this in turn required them to follow the confined space procedure and to sign a tag taking the condenser out of operation. There is some dispute about whether Cutlip

[1] Case 6–CA–23785, dated September 30, 1991; and Case 6–CA–26001, amended February 15, 1994.

in fact was required to sign a tag, because, according to his testimony, he was instructed only to watch the water level indicator. In any event, neither Cutlip nor Prah signed the tag for which they were disciplined with suspensions.

Cutlip was given 10 days, since he had just been suspended for painting. Prah was suspended for 4-1/2 days. On February 24, Brown was reprimanded by Operations Superintendent T. G. Shusko because his employees had not followed the proper confined space procedure and had not signed any master tag releases. This was confirmed in a letter of March 15. Cutlip and Prah were also reassigned to day maintenance, which according to their testimony, has caused them a substantial loss of income. And they were both tested for drugs. Since Prah tested positive, he was required to sign a ''Last Chance Agreement'' by which any future violations of company rules would result in discharge.

The suspensions and shift reassignments (but not requiring Prah to sign the agreement) are alleged by the General Counsel as violative of Section 8(a)(3) of the Act. It is further alleged that the Respondent violated Section 8(a)(4) since Cutlip and Prah had participated in the earlier proceedings.

B. *Analysis and Concluding Findings*

Although the union activity of Cutlip and Prah occurred years before the events here, the General Counsel argues that such was nevertheless the motivating cause behind the suspensions and shift reassignments. Further, the General Counsel argues that evidence of union animus associated with the activity of Cutlip and Prah can be used to establish the violations alleged here, notwithstanding that such occurred long before the limitation period of Section 10(b) and prior to the settlement of the earlier cases.

To prove antiunion motive, the General Counsel relies on several statements, consideration of which the Respondent argues is barred by Section 10(b). According to the testimony of both Cutlip and Prah, and undenied, in April 1991 Supervisor Robert Lyons told Cutlip, ''Let's face it, Gary, your problem stems from your Union activities.'' And during the third step of Cutlip's grievance on being reassigned to day maintenance in 1993, Corporate Manager Don Fienstra (designated as executive director of operations in the safety program material) said, ''Gary, don't you expect a little bit of retaliation.'' Finally, according to the testimony of former Shift Supervisor James Bonafield, in May 1993 Shusko told him not to talk to employees (including Prah) who were considered by Shusko to be anticompany.

It is well settled that events occurring more than 6 months before the charge may be used as ''background'' to shed light on matters within the limitation period, if independently the acts within the limitation period can be found unfair labor practices. However, where conduct within the 10(b) period can be found unlawful only by reliance on events outside that period, evidence of those matters cannot be relied on ''since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful.'' *Machinists Local 1424 v. NLRB*, 362 U.S. 411, 417 (1960).

Here, the evidence offered by the General Counsel predating the 10(b) period goes beyond mere background. It is offered to show specific animus toward Cutlip and Prah because they engaged in union activity, from which an unlawful motive can be inferred. Since in fact company rules were broken, the discipline of Cutlip and Prah can be found unlawful only if it can be concluded that their participation in a Board proceeding or union activity was a motivating factor. Thus, the pre-10(b) events more than simply shed light on the alleged unlawful acts. They provide evidence of a substantive element of the allegation—unlawful motive.

Further, even if this evidence were considered only background, it still would not likely be admissible. Whether the General Counsel is barred from litigating conduct occurring prior to a settled case for use as background evidence has not been definitively determined by the Board. However, the administrative law judges who have considered this issue have concluded that such evidence is not available where, as here, the settlement agreements have not been set aside by the Regional Director. *Great Western Produce*, 293 NLRB 362 (1989); *Heck's Properties*, 264 NLRB 501 (1982); *Wright Motors*, 237 NLRB 570 (1978).

I agree with the Respondent that this evidence should not be considered due to the proscription of Section 10(b). Use of such evidence to establish motive goes beyond mere background to explain facts within the 10(b) period. Motive is a substantive element of an 8(a)(3) allegation and therefore must be established by evidence within 6 months of the charge filing. Further, I agree with those judges who have declined to consider such evidence even as background where it predates a settlement agreement which has not been set aside.

However, as of the day of the hearing in the matter there is some evidence of animus toward employees who engage in union activity. Thus Station Manager Ned Merrifield testified that in an earlier proceeding he had made a statement to the effect he considered Cutlip anticompany because of his union activity and because he had his activities with the Board. By way of explanation, he testified ''I don't deny them the right to do whatever, but I still feel that this type of activity is not in the best interest of 170 people at the Fort Martin Power Station. I feel that it is a preoccupation which makes them susceptible to injury or whatever at the station.''

Thus, without considering the presettlement, pre-10(b) evidence, I conclude that the Respondent did consider Cutlip and Prah ''anti-company'' because of their previous union and Board activity. But whether such is a sufficient demonstration of animus to establish a prima facie case of discrimination within the meaning of *Wright Line*[2] is another matter. The alleged violation is not that some high official of the Respondent thought Cutlip and Prah were anticompany. It is whether they were disciplined because of their union or other protected activity. No doubt words such as ''anti-company'' can sometimes be translated to mean the individual has engaged in protected activity not favored by the Company and where such activity is in close proximity to the discipline, an inference of unlawful motive can be made. *Knoxville Distribution Co.*, 298 NLRB 688 (1990). But where, as here, whatever is thought to be anticompany happened years earlier the nexus between that activity and subsequent discipline is tenuous. It had been 3 years since Prah had engaged in any union activity. For Cutlip it had been 5. The second Board case had been finalized a year before the events here.

[2] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st. Cir. 1981), cert. denied 455 U.S. 989 (1982).

The fact that one sometime engaged in union or other protected activity, or testified in a Board proceeding, does not immunize him from all future discipline. On the other hand, an asserted breach of company rules cannot be seized on to retaliate against one for past protected activity.

There is no real dispute that in fact Cutlip spray painted in the welding shop and this was a violation of company rules. He maintains, however, that others did it; that he did not spend much time painting; and, that to go to the paint shop in another building would have been an imposition on a cold day. Nor is there dispute that Prah was the lead man and therefore to some extent responsible for Cutlip's inattention to safety.

Cutlip does not dispute the no painting rule. He argues that others did so as well, noting that the no painting sign was itself painted over. There is no basis to conclude that that the rule was not legitimate or that enforcement of it was a pretext. The violation may have been fairly trivial, but then so was the punishment. Within the previous 9 months Cutlip had been reprimanded for his part in a near miss involving hoisting a piece of machinery with a trolley incapable of handling the load, and for lying to his supervisor (which Cutlip explained as ''stretching the truth''). In addition, Cutlip had had four on-the-job injuries, though none was severe or caused lost time. Nevertheless, his safety record compared to others was sufficiently poor as to justify the Respondent in suspending him for 2 days for the painting incident. Conversely, Prah had a good safety record. Thus, he was merely given verbal warning.

The discipline given Cutlip and Prah seems in line with their particular participation in the painting incident and their past records. The 2-day suspension of Cutlip and the warning to Prah for an undisputed safety violation cannot be deemed pretextual.

In brief, the Respondent's tagging procedure requires each person who is to work on a piece of operating equipment to sign tags to be placed on switches, valves, and the like, to indicate they are not to be used. And a master tag is to be signed and put in the control room. The object of this procedure is to ensure that when a component is taken out of operation for maintenance it will not be put back into operation inadvertently, which if done could cause injury or death. The tagging procedure is well known. Employees are given extensive training on safety and are expected to comply with all the Respondent's safety rules. The Fort Martin facility has an outstanding safety record.

Although it may be the case that occasionally an employee will not follow the tagging procedure, such is the exception. Thus Bonafield testified that since his employment in 1966 he has observed maybe 100 tagging violations, which would generally be corrected by telling the employee to sign the tag. He also testified that he would see more than 1000 master releases a year. Thus, failure to sign a tag, on the record here, is considered a very serious, but also very rare, violation of safety practices.

Undisputedly, Cutlip and Prah did not sign appropriate tags on January 26 when assigned to work on the condenser. Cutlip maintains that he was assigned only to look at the water level which could not have required him to go inside the condenser. Thus he was not required to sign a tag, though he did testify that Prah should have signed one. Prah does not dispute that he should have signed a tag and did not do so. Whether Cutlip was in fact required to sign a tag given what he states his job to have been and the tagging procedure is not clear; however, Knicely testified that Cutlip could have been required to go into the condenser if Prah had gotten into trouble, a fact which Cutlip does not really dispute. In short, it does appear that under the tagging procedure Prah for sure and probably Cutlip were required to sign tags. Further, the tagging procedure is considered a very important safety matter. Thus some discipline of these two employees does not imply that the true motive lay elsewhere.

For this violation, Cutlip was suspended 10 days, Prah 4-1/2 days, and Supervisor Brown given a reprimand. Given the past performance of these individuals, such does not seem excessive for the violation. Cutlip and Prah were also reassigned to the day shift so that they could be more closely supervised. Given the nature of this violation of safety rules, and in Prah's case, the fact that he tested positive for drugs, I conclude that the Respondent was justified in making the reassignment. At least, the suspensions and reassignments were not so unreasonable as to imply a hidden motive.

The General Counsel argues that others have violated safety rules and have not been disciplined. The record, however, does not really support this argument. In fact the Respondent has disciplined others, including Clark Spitznogle, whom Cutlip maintains engaged in safety violations. Spitznogle was given a verbal reprimand for failing to sign confined space paperwork. Other employees at this facility, and companywide, have been suspended for 10 days or more.

Given the remoteness of the union activity, the limited evidence of animus, the nature of the undisputed safety violations here, and the reasonableness of the Respondent's discipline, I conclude that Cutlip and Prah would have been suspended and reassigned had there been no union activity in past years. Further, I cannot conclude that the camera case was involved in the Respondent's motive. Twenty employees were plaintiffs, but only Cutlip and Prah contend they suffered as a result of the suit. There is nothing in the record to suggest that they would be selected for punishment. They were not leaders in this matter. The fact that one event occurs after another is not sufficient to establish a causal connection between them. There is just no evidence that discipline for the safety violations was in any way motivated by the camera lawsuit.

From the totality of the record in this matter, I conclude that the General Counsel did not establish a violation of the Act by a preponderance of the credible evidence. Accordingly, I shall recommend that these cases be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The complaints are dismissed.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.